No. 89-898

(2)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

BYWATER NEIGHBORHOOD ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review environmentally based challenges to an ongoing Federal Communications Commission broadcast licensing proceeding.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 879 F.2d 165. The opinion of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1989. On November 6, 1989, Justice White extended the time within which to petition for a writ of certiorari to and including December 6, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory and Regulatory Background.* The Federal Communications Commission has exclusive jurisdiction under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, to license the use of the radio spectrum. 47 U.S.C. 301. Television microwave stations, known as "studio-transmitter links" (STLs),[1] are among the types of facilities the FCC licenses. STLs send a broadcast station's signal from its studio to its transmitter for transmission to the general public. They may be located on buildings, on existing towers, or—as proposed in this case—atop a specially constructed tower.

a. Applicants for certain facilities, including, for example, radio or television broadcast stations, must receive specific permission to construct their facilities (47 U.S.C. 319(a) and (d)). When the station is ready to go on the air, the owner applies for an operating license (47 U.S.C. 319(c)). For certain other facilities, the applicant files a single application for permission both to construct and to operate the facility. See *UA-Columbia Cablevision, Inc.*, 55 F.C.C.2d 656, 660 (1975).

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[1] An STL is defined at 47 C.F.R. 74.601(b), which states as follows:

> *TV STL station (studio-transmitter link).* A fixed station used for the transmission of TV program material and related communications from the studio to the transmitter of a TV broadcast or low power TV station or other purposes as authorized in § 74.631.

Its permissible uses are set forth in 47 C.F.R. 74.631(b):

> A television broadcast STL station is authorized to transmit visual program material between the studio and the transmitter of a television broadcast station for simultaneous or delayed broadcast.

STLs are in a third category of facilities, in which the FCC licenses only the operation, not the construction, of the facility. FCC Form 327, 50 Fed. Reg. 23,417, 23,418 (1985); see *Amendment of Part 73 of the Commission's Rules Concerning Licensing Procedures and Reporting Requirements in the Cable Television Relay Service (Cable Relay Service)*, 100 F.C.C.2d 1136, 1139 (1985). Although the applicant need not receive an operating permit before building such a facility, it cannot operate the facility until it applies for and receives permission to do so (47 U.S.C. 301). With this "one-step" procedure, an applicant that constructs any part of its facility or appurtenant structures before receiving operating authority takes the risk that such authority will be denied and it will be unable to use the facility.

Construction of facilities subject to the one-step procedure is thus generally governed only by local regulations and zoning restrictions. See 47 C.F.R. 74.631-74.632.[2] Nevertheless, the FCC will not authorize the operation of facilities unless it has reasonable assurance that the facility will comply with local ordinances. For example, the FCC will not issue an operating permit for a transmitter to be located on top of a supporting tower the construction of which would be prohibited by local zoning restrictions. See, *e.g.*, *Northbanke Corp.*, 46 Rad. Reg. 2d (P & F) 453, 457 (FCC 1979).

b. When the FCC receives an application to operate an STL, the agency announces the filing to the public (47 C.F.R. 73.3564(c)). Members of the public may challenge the STL application by filing

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[2] Of course, if a proposed STL supporting tower would constitute a potential hazard to air traffic, federal regulations apply. See 47 C.F.R. 17.7.

an informal objection at any time before the FCC acts on the application (47 C.F.R. 1.41, 73.3587).[3] If the FCC receives an informal objection it will consider the allegations therein, together with the response of the applicant, before deciding whether to grant the application. The FCC may grant an application only if it finds that the "public interest, convenience and necessity would be served" thereby (47 U.S.C. 309 (a)).

c. FCC public interest determinations are subject to the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.* Under Section 106 of the NHPA, 16 U.S.C. 470f, a federal agency head with jurisdiction over a federally licensed undertaking must consider the effects of the undertaking on properties included in or eligible for the National Register of Historic Places. Before approving any such undertaking, the agency must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. See also 36 C.F.R. 800.1(c)(i) and 800.6 *et seq.* By FCC regulation, the Commission complies with these NHPA-imposed duties by requiring applicants who seek to operate "[f]acilities that may affect districts, sites, buildings, structures or objects * * * that are listed, or are eligible for listing, in the National Register of Historic Places" to comply with special processing requirements (47 C.F.R. 1.1307). Those applicants must note in the application that the facility might have a significant impact on a historic site, and must provide the Commission with sufficient information

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[3] Section 309(c)(2)(E) and (d)(1) of the Communications Act, 47 U.S.C. 309(c)(2)(E) and (d)(1), preclude filing of a formal petition to deny an STL application. Compare 47 U.S.C. 309(b) and (d)(1).

to enable the FCC to carry out its duties under the NHPA (47 C.F.R. 1.1308(a)).[4] If the applicant notes the possibility of significant historic preservation concerns, the FCC then consults with the Advisory Council before determining whether the facility will have a significant impact on a historic site (47 C.F.R. 1.1314(d); 36 C.F.R. 800.6). If such an impact is found to exist, the FCC's rules specify procedures to mitigate the impact or to balance the need for the facility against the impact (47 C.F.R. 1.1314-1.1319). Under the one-step licensing procedure, the license application must contain the necessary information, and any special processing required must be completed before the license is granted (47 C.F.R. 1.1312). Informal objections may include challenges to the adequacy of compliance with these NHPA procedures (47 C.F.R. 1.1307(c), 1.1313).

d. The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals by any person "who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application" for a construction permit or station license (47 U.S.C. 402(b)(1) and (6)).

2. *History of the Case.* Petitioner challenges an as yet incomplete FCC licensing proceeding, seeking to enjoin construction of an STL facility by respondent

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[4] The FCC is entitled to rely on the representations of applicants, who are "well aware of their duty, not only to avoid positive untruths, but to 'be scrupulous in providing complete and meaningful information.'" *Bilingual Bicultural Coalition on Mass Media, Inc.* v. *FCC*, 595 F.2d 621, 635 (D.C. Cir. 1978) (quoting *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)).

Crescent City Communication Company, Inc., which currently holds a television station construction and operating permit for WCCL-TV, Channel 49 in New Orleans.[5] On July 11, 1988, respondent Crescent City applied, pursuant to 47 U.S.C. 308-309 (1982 & Supp. V 1987), for a permit to operate an appurtenant STL. The application did not disclose that the supporting tower respondent Crescent City proposed to build for its STL would be located in the Bywater Historic District in New Orleans, which is listed in the National Register of Historic Places by the United States Department of the Interior (Pet. 7). The application was placed on public notice on July 25, 1988. FCC Public Notice No. 14,224.

On November 16, 1988, petitioner filed its complaint in district court seeking to enjoin further construction of the tower in the historic district; on December 19, 1988, it petitioned the Commission to deny respondent Crescent City's STL application. On December 15, 1988, respondent Crescent City submitted an environmental assessment as an amendment to its FCC license application. See 47 C.F.R. 1.1307(a)(4) and 73.3522. As required by 47 C.F.R. 1.1307(a)(4), the EA revealed that the tower is located in the Historic District. At that time, the FCC deferred further processing of respondent Crescent City's STL license application, in order to ensure compliance with the FCC's NHPA regulations, 47 C.F.R. 1.1308. Pet. App. 29a-30a.[6] Thus, al-

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[5] Crescent City currently operates the station under "program test authority" pursuant to 47 C.F.R. 73.1620. The station's application for its full operating license is pending at the FCC.

[6] Processing was further delayed following a February 22, 1989, state court order revoking the local Board of Zoning

though petitioner asserts (Pet. 9) that the STL supporting tower has been constructed, the FCC has, to date, neither approved nor denied the application (Pet. App. 2a). Accordingly, the STL facility is not operative.

In its complaint, petitioner alleged that the FCC violated the NHPA, as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, by failing to consult with the Advisory Council and by failing to take into consideration the environmental impact of the project before allowing the tower's construction. Petitioner asserted that "the FCC has authorized the construction and installation of * * * [the] STL tower. The FCC contemplates no further action or scrutiny of this project prior to the construction of the tower." Complaint 11. As relief, petitioner requested (1) a declaratory judgment that the FCC violated the NHPA and NEPA; (2) a temporary restraining order and preliminary injunction enjoining construction and operation of the support tower; and (3) award of attorney's fees and costs.[7]

Adjustment's approval of a zoning variance for the STL tower's construction. That order resulted from a suit by petitioner against the zoning board challenging the grant of two variances to permit the construction of the tower and transmitting antennas. No. 88-13047 (La. Civ. Dist. Ct. Orleans Parish) (App., *infra*, 1a-5a). The FCC informs us that respondent Crescent City is currently utilizing, pursuant to temporary FCC authorization, an STL mounted on a building. Although respondent Crescent City has indicated its continued interest in obtaining an operating permit for the STL at issue in the instant proceeding, no further action is contemplated on its application for that permit until the zoning question is resolved.

[7] The complaint also sought a permanent injunction requiring removal of an appurtenant facility constructed by re-

The district court dismised the complaint on the ground that the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over this matter (Pet. App. 10a-11a), and the court of appeals affirmed (*id.* at 1a-9a). The court of appeals agreed that jurisdiction over challenges to FCC licensing actions lies exclusively with the District of Columbia Circuit (*id.* at 4a-8a); it also rejected petitioner's claim of jurisdiction under the Mandamus Act, 28 U.S.C. 1361, as well as the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, adhering to "the general principle that Congress's exclusive and specific review procedure should be followed" (Pet. App. 7a). The court observed that once a final order issues with regard to the STL application, petitioner "must follow the path Congress has laid out for judicial review" of that order (*id.* at 9a).

ARGUMENT

1. Petitioner's objection is to the construction of the support tower for the STL facility. Its effort to obtain a remedy from the FCC for that construction is based on a fundamental misapprehension of the scope of the Commission's licensing authority. The Commission licenses the operation of the facility. It does not license the construction of its support tower; still less does it control the applicant's decision con-

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spondent Notel, a company associated with respondent Crescent City. That request for relief was based on the complaint's challenge to two related applications of respondent Notel to construct and operate two satellite earth stations. The petition does not seek review of the court of appeals' determination that petitioners failed to exhaust their administrative remedies before seeking judicial review of those applications. See Pet. 9 n.10.

cerning where the tower will be placed. And the decision whether the facility is to be placed on a building, an existing tower, or a tower constructed expressly for the purpose, is up to the applicant, not the FCC. The FCC has no more authority to direct the applicant to remove the support tower at issue here than it would have to require the removal of a building, simply because the applicant intended to place its STL facility on it. The dispute over the construction of the tower is for the local authorities, not the FCC. See note 6, *supra*. Moreover, despite petitioner's apparent contrary assumption, the Commission's actions in this case convincingly demonstrate that the Commission will require compliance with the applicable NHPA procedures before issuing any license for the operation of the STL on the challenged tower.[8]

2. In any event, the court of appeals correctly concluded that review of FCC licensing actions may be had only in the United States Court of Appeals for the District of Columbia Circuit. That determination does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

The review of broadcast licensing matters is vested in the United States Court of Appeals for the District of Columbia Circuit by 47 U.S.C. 402(b), which provides that:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
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> * * * *

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[8] Petitioner has not contended that those procedures are inadequate.

> (6) By any * * * person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application * * *.

Although this provision refers in terms to "decisions and orders of the Commission," and permits an appeal by a person "affected by any order," it is clearly established that it vests judicial review of *all* cases "involving the exercise of the Commission's radio-licensing power"—including a refusal to exercise that power—in the United States Court of Appeals for the District of Columbia Circuit. *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962) (denial of a petition to revoke a construction permit).

Even in the absence of an express exclusivity provision—like that contained in 28 U.S.C. 2342(1) for certain final FCC orders—explicit statutory review procedures of the kind contained in 47 U.S.C. 402(b) are presumed to be exclusive of other avenues of review. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). Such grants of exclusive review power have long been held to be constitutional. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938).

Because Congress has created a statutory review scheme that is exclusive, the federal district courts lack jurisdiction over licensing matters. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 741 (1985); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (*TRAC*) ("even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,' as it has here with regard to final FCC actions,

a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute"). As the court recognized in *TRAC*, it follows that the District of of Columbia Circuit has exclusive jurisdiction, even in the absence of final agency action, "to hear suits seeking relief that might affect [that court's] future statutory power of review." 750 F.2d at 72.

Similarly, district court review is not available under the Administrative Procedure Act, 5 U.S.C. 703, which provides for district court review when statutory review is inadequate: "[w]here statutory review is available in the Court of Appeals it will rarely be inadequate." 750 F.2d at 78.[9] The court below therefore correctly gave effect to "Congress's specific and obvious intent to restrict to the circuit

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[9] Petitioner asserts (Pet. 5) that 16 U.S.C. 470w-4, the NHPA provision governing the award of attorney fees, provides another alternative jurisdictional basis for its suit. The court of appeals, relying on its previous decision in *Vieux Carre Property Owners, Residents & Assocs.* v. *Brown*, 875 F.2d 453 (5th Cir. 1989), cert. denied, No. 89-563 (Jan. 8, 1990), similarly suggested that Section 470w-4 creates a private right of action (Pet. App. 3a, 6a). We submit that the statutory language (which provides in relevant part that "[i]n any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, * * * the court may award attorneys' fees, * * * and other costs") simply permits the award of attorney fees and costs in civil actions otherwise authorized to be brought in district courts. In any event, even if this provision could otherwise be interpreted as creating a right of action to enforce the NHPA, it could not overcome the explicit, limited jurisdictional provision contained in Section 402(b), as the court of appeals correctly recognized (Pet. App. 6a-7a). Accordingly, the court's remarks about the attorney fee provision of the NHPA are dicta.

courts any appeals from rulings of the FCC" (Pet. App. 6a). It accordingly determined that, upon issuance of a final licensing order, "[petitioner's] complaint will fall squarely within section 402(b)(6), and venue will lie only in the District of Columbia Circuit." Pet. App. 9a.

The principles just discussed are not affected by the fact that petitioner seeks to litigate environmental issues. It is clearly established that, even in such circumstances, statutorily prescribed review procedures must be followed; there is no concurrent jurisdiction in the district court simply because a violation of an environmental statute such as NEPA or the NHPA is alleged. *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979); *Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 192-193 (7th Cir.), cert. denied, 479 U.S. 847 (1986); *City of Alexandria* v. *Helms*, 728 F.2d 643 (4th Cir. 1984); *Washington Utilities & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1167-1168 (9th Cir.), cert. denied, 423 U.S. 836 (1975).[10]

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[10] For example, in *City of Rochester* v. *Bond*, *supra*, the appellants attempted to invoke district court jurisdiction to challenge an FAA order (a "no hazard determination" regarding a radio antenna tower) and the resulting FCC construction permit. They maintained that both agencies failed to comply with NEPA by not preparing an Environmental Impact Statement, and alleged that district court review was available for their NEPA claims. The court of appeals stated unequivocally that "we disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be." 603 F.2d at 936. Accordingly, review of the FAA order and the FCC permit was available only in the court of appeals. *Id.* at 938-939.

The case cited by petitioner (Pet. 11, 14) in support of its claim that the circuit courts allow interim review of agency actions pending final determinations stands alone, and in any event does not present a square conflict with the decision below. In *Susquehanna Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981), the court held that a private party seeking to compel agency compliance with NEPA need not exhaust administrative remedies before filing suit in federal district court to challenge the Nuclear Regulatory Commission's informal authorization of the discharge of contaminated water.[11] In *Susquehanna*, the plaintiffs challenged a specific agency action—authorization to the licensee to begin installation of a water treatment system without NEPA compliance (619 F.2d at 240 n.10). Here, by contrast, petitioner acknowledges that the FCC has given no approval at all. Pet. 6, 7-8. Thus, while we disagree with the result reached in *Susquehanna*, the facts there presented a more colorable justification for judicial intervention than is presented here.

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[11] In dissenting from the denial of certiorari in *Susquehanna*, Justice Rehnquist (joined by the Chief Justice and Justice Powell) noted (449 U.S. at 1096, 1100) that the holding of the Third Circuit is contrary to this Court's settled teaching on exhaustion of administrative remedies, and that the "trifurcated review procedure [resulting from the Third Circuit's holding] is not only inefficient, duplicating judicial and administrative effort, but more importantly, it leads to premature interference with agency processes, contrary to the policy underlying direct review statutes." Justice Rehnquist observed that the Solicitor General, in the government's memorandum in opposition to the petition for certiorari, stated that *Susquehanna* had been incorrectly decided, but was anomalous and probably would be of little precedential effect. 449 U.S. at 1100.

Moreover, the holding in *Susquehanna* has subsequently been distinguished by the Seventh Circuit as applying in "very special circumstances, as when the administrative proceeding is informal and the record of that proceeding has to be reconstructed in the judicial review proceeding before the judicial review proper can begin." *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193, 1196 (1983), cert. denied, 466 U.S. 926 (1984). There is no indication in this case that the record before the FCC will be inadequate to review compliance with the NHPA.[12]

2. Petitioner's second question is not properly presented on this record. Petitioner asserts that "jurisdiction over the nonfederal entities is necessary to afford [petitioner] complete relief, regardless of the forum in which the action must be brought." Pet. 16-17. But the court of appeals here dismissed the complaint solely because, under the statutory scheme enacted by Congress, it has no jurisdiction to consider such complaints. Because its holding related

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[12] Petitioner also suggests (Pet. 12 & n.17) that the importance of interim judicial review of "streamlined" agency licensing procedures is confirmed by *Friends of Sierra R.R.* v. *ICC*, 881 F.2d 663 (9th Cir. 1989), petition for cert. pending *sub nom. Tuolumne Park & Recreation Dist.* v. *ICC*, No. 89-701. In that case, the ICC refused to reopen agency proceedings authorizing abandonment of a railroad, in light of the passage of 16 months between the final agency action and the request for reopening. The court of appeals, without reaching the merits of petitioners' claims, simply held that it lacked jurisdiction over the tardy challenges. The only issue considered was the agency's refusal to reopen its proceeding, and the decision turned on the fact that no new evidence or changed circumstances justified the delay in seeking review of the agency action. Nothing in the decision suggests any deficiencies in consolidated agency review procedures similar to the FCC's "one-step" procedure.

only to the propriety of petitioner's selection of a forum, the court's perfunctory comment (Pet. App. 3a n.7)—that even if it had jurisdiction over the agency, the suit against the private respondents would have to be dismissed—is obiter dicta. Such dicta do not present a proper issue for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

NO. 88-13047 DIVISION "K"

BYWATER NEIGHBORHOOD ASSOCIATION, ET AL

versus

THE BOARD OF ZONING ADJUSTMENTS, ET AL

JUDGMENT

This matter came for trial on the petitioner's application for certiorari and review:

After considering the pleadings, the decision of the Board of Zoning Adjustments, the argument of Counsel and the law and for the written reasons assigned this day:

IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Board of Zoning Adjustments in the matter of Docket #93-88, the application of NOTEL, Inc. and in the matter of Docket #94-88, the application of Crescent City Communications Inc. be, and the same are hereby reversed and set aside and granting of variance to NOTEL, Inc. and Crescent City Communications, Inc. by the Board of Zoning Adjustments are both hereby reversed.

JUDGMENT READ, RENDERED AND SIGNED this 22nd day of February, 1989 at New Orleans, Louisiana.

/s/ Richard J. Ganucheau

RICHARD J. GANUCHEAU
Judge

CIVIL DISTRICT COURT FOR THE PARISH
OF ORLEANS
STATE OF LOUISIANA

NO. 88-13047 DIVISION "K"

BYWATER NEIGHBORHOOD ASSOCIATION, ET AL

versus

THE BOARD OF ZONING ADJUSTMENTS, ET AL

REASONS FOR JUDGMENT

The Bywater Neighborhood Association, Malcolm Heard, Jr. and Marc Cooper petition this Court to review the decision of the Board of Zoning Adjustments (hereinafter BZA) of the City of New Orleans upon the applications of Crescent City Communications Inc. (hereinafter Crescent City) and NOTEL Inc.

Crescent City filed an application for variance dated April 20, 1988 to be allowed to construct a 200 foot microwave link tower on its property described as 3327 Chartes Street between Desire and Piety Streets.

NOTEL, Inc. filed an application for variance dated April 18, 1988 from the 50 foot distance set back from all property lines for construction of transmitting antennas.

The Court feels that the information furnished the BZA by the applicants Crescent City and NOTEL, Inc. was incomplete and erroneous in the particulars set out herein below and that ". . . due notice to the interested parties . . ." as required by the zoning laws was not properly given.

As to the application for variance filed by Crescent City the Court finds that:

The Board of Zoning Adjustments was erroneously informed that Cresent City complied with all Federal Communications Commissions regulations concerning the proposed construction of the 200 foot tower;

The Board of Zoning Adjustments was not informed that the site of the tower was located in a National Historic District;

The Board of Zoning Adjustments was informed by the President of Crecent City that the proposed site was located in a light industrial zone, not near the residential districts;

The Board of Zoning Adjustments granted a variance, as was applied for by Crescent City, however the Zoning Ordinance does not authorize that grant.

As to the application by NOTEL, Inc. for a variance the Court finds that;

The survey of the property furnished with the application was of a parcel of property not owned by the applicant;

The notice requirement to interested parties was not met;

The Board of Zoning Adjustments was assured that all Federal Communications Commission requirements had been met; which was not correct;

The Board of Zoning Adjustments was told that no historic sites were involved in either application.

This Court is not empowered to substitute its judgment for that of the Board of Zoning Adjustments. The Court must uphold decisions of the Board unless it is shown that the decision is not supported by substantial and competent evidence or that the decision was arbitrary or unreasonable. *Gertler Vs. City of*

New Orleans 346 So2nd 288 (La. App. 4th Cir. 1977)

It appears from the record of the hearing before the Board of Zoning Adjustments that representations made by the applicants are not verified by the Board and that the accuracy of the information furnished was not checked. That may be due in part to the failure of any opponents to appear at the hearing or a lack of resources available to the Board.

The Board of Zoning Adjustments must find that *all* of the nine Standards for Variation set out in the Zoning Ordinance at Article 15, Section 2.3(1) have been met as a condition to granting a variance.

Given the errors and deficiencies in the applications filed by Crescent City and NOTEL the Board of Zoning Adjustments was unable, in the Court's opinion, to make the findings required by the Zoning Ordinance.

The plaintiffs seek review of the decision of the Board of Zoning Adjustments pursuant to La. R.S. 33:4727 and a similar provision of the Zoning Ordinance. The Court's authority in the premises is set out in L.A. R. S. 33:4227 E(5). Although this case seems appropriate for remand to the BZA to reconsider the application under review, no authority exists, in the Court's view for such an order. This Court may only reverse, confirm or modify the decision brought for review.

For the above reasons, the decision of the Board of Zoning Adjustments in these matters; Docket #94-88, the application of Crescent City Communications, Inc. and #93-88, the application of NOTEL, Inc., are both hereby reversed and set aside.

New Orleans, Louisiana this 22nd day of February, 1989.

/s/ Richard J. Ganucheau

RICHARD J. GANUCHEAU
Judge

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